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(30)

NO. 02-626

In The
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE COALITION OF GREATER MINNESOTA CITIES AND THE CITY OF SAINT CLOUD, MINNESOTA IN SUPPORT OF RESPONDENTS

DOUGLAS L. SKOR*
Larson King, LLP
2800 Wells Fargo Place
St. Paul, MN 55101
(651) 312-6574
* *Counsel of Record*

CHRISTOPHER M. HOOD
STEVEN W. NYHUS
Flaherty & Hood, P.A.
444 Cedar Street, Suite 1200
St. Paul, MN 55101-2129
(651) 225-8840

Counsel for Amici Curiae Coalition of Greater Minnesota Cities and the City of Saint Cloud, Minnesota

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QUESTION PRESENTED

Whether the transfer of untreated water containing pollutants from a source water body to another, naturally distinct destination water body constitutes an "addition" of pollutants under the federal Clean Water Act, 33 U.S.C. Section 1251, *et seq.*, where the water from the source water body could not enter the destination water body *but for* the transfer activity of a point source.

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, the Coalition of Greater Minnesota Cities (the "CGMC") and the City of Saint Cloud, Minnesota ("St. Cloud") request leave to file the accompanying brief as *amici curiae* in support of Respondents on the writ of certiorari granted to Petitioner South Florida Water Management District, which seeks reversal of the lower court's decision in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002). Consent for *amici* participation was requested of all parties on November 13, 2003, and granted on the same date.

INTERESTS OF *AMICI CURIAE*

Amici curiae submit this brief in support of Respondents on the writ of certiorari granted to Petitioner South Florida Water Management District, which seeks reversal of the lower court's decision in *Miccosukee Tribe of Indians of Florida, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1] *Amici* wish to clarify proper application of the Clean Water Act to inter-basin transfers of untreated water, and the alleged "split" among the federal circuits on this question.

The Coalition of Greater Minnesota Cities (the "CGMC") is an association of 72 city governments located throughout the State of Minnesota. The City of Saint Cloud, Minnesota ("St. Cloud") is a political subdivision of the State of Minnesota and a CGMC member city. St. Cloud and most other CGMC cities treat residential, commercial and industrial wastewater through publicly owned treatment works (POTWs), which operate under five-year National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permits issued by the Minnesota Pollution Control Agency (MPCA) pursuant to Clean Water Act delegation.

Since January 2001, St. Cloud has been involved in

[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

litigation regarding the re- issuance of the NPDES permit for its POTW, which had last been re-issued in 1994. As discussed below, a key issue in that litigation is whether St. Cloud's phosphorus discharge, which goes directly to the Mississippi River, could be held to "affect" the Vadnais Chain of Lakes ("Vadnais Chain"), a hydrologically distinct set of waters (i.e., not connected to the Mississippi River), solely because the City of Saint Paul ("St. Paul") withdraws water from the Mississippi River and deposits that untreated water into the Vadnais Chain. Because of the potential adverse impacts of Mississippi River water on the more sensitive Vadnais Chain, St. Paul treats the river water to reduce phosphorus, a nutrient that would cause excessive algae growth in those lakes. St. Cloud is not held responsible for the cost of treatment by St. Paul because it is the action of St. Paul, not St. Cloud, that impacts water quality in the Vadnais Chain.

If the Eleventh Circuit's decision is reversed on the issue of these so-called "inter-basin transfers," it would result in St. Cloud, CGMC member cities and cities throughout the country being held liable for otherwise compliant levels of pollutants in their discharge entering hydrologically distinct waters, solely because of transfer activities conducted by third parties. These third parties would in effect reap the benefits of the water transfers, while imposing the detriments of their actions on others, contrary to the arguments made by other *amici curiae*. No federal circuit has ever supported this position.

In 1973, the MPCA adopted a regulation designed to control point source discharges of phosphorus into waters of the state, known as the "Phosphorus Rule." The Phosphorus Rule provides that "where the discharge of

effluent is directly to or affects a lake or reservoir, phosphorus removal to one milligram per liter (1 mg/L) shall be required." Minn. R. 7050.0211, subp. 1a.

St. Cloud's POTW discharges directly to the Mississippi River, roughly 60 miles north of the Minneapolis-St. Paul metropolitan area. St. Paul withdraws water from the Mississippi River at a pumping station located at Fridley, a northern suburb of Minneapolis. The river water withdrawn by St. Paul, treated to reduce pollutants that could adversely impact the Vadnais Chain, is then deposited into the Vadnais Chain to augment St. Paul's drinking water supply. The Mississippi River and the Vadnais Chain are naturally distinct navigable waters with no natural connection. Water from the Mississippi River can enter the Vadnais Chain only by means of St. Paul's pumping station activity.

On December 26, 2000, the MPCA issued St. Cloud's draft NPDES permit for public review and comment. The MPCA did not recommend a 1 mg/L phosphorus limit pursuant to the Phosphorus Rule, because the St. Cloud WWTF discharges directly to a river and the MPCA could not demonstrate that St. Cloud's phosphorus discharge affects any downstream lake or reservoir, as required by the Phosphorus Rule. The Minnesota Center for Environmental Advocacy (MCEA), a local environmental group, petitioned for a contested case hearing on the draft permit in January 2001. Among the allegations made by the MCEA was that St. Cloud's phosphorus discharge is transported in the Mississippi River 60 miles downstream to Fridley, where the river water containing phosphorus is withdrawn by St. Paul's Fridley pumping station, then deposited in the Vadnais

Chain. Based on this transfer, MCEA argued, St. Cloud's phosphorus discharge "affects" the Vadnais Chain, and a phosphorus limit is required.

The MPCA granted MCEA's request for a contested case hearing and referred the matter to an Administrative Law Judge (ALJ). After the completion of discovery, St. Cloud moved for summary disposition on September 5, 2002, alleging that MCEA had produced no evidence to suggest that St. Cloud's phosphorus discharge affected any downstream lakes or reservoirs because, *inter alia,* it is St. Paul, not St. Cloud, that discharges to the lakes. The MPCA joined in St. Cloud's motion, and MCEA opposed the motion.

St. Cloud relied on the Eleventh Circuit's decision in *Miccosukee* for the proposition that St. Cloud's phosphorus discharge could not "affect" the Vadnais Chain, because water from the Mississippi River could not enter the Vadnais Chain *but for* St. Paul's intervening transfer action. Assuming that St. Cloud's phosphorus discharge actually traveled the 60 miles downriver from St. Cloud to Fridley, it was St. Paul's pumping station, and not St. Cloud's POTW discharge, that became the point source "adding" phosphorus, and therefore "affecting," the Vadnais Chain through the transferred river water.

On October 31, 2002, the ALJ granted St. Cloud's motion for summary disposition and made a recommendation consistent with the *Miccosukee* decision to the MPCA Citizens' Board. The ALJ's recommended order quoted *Miccosukee* and held that because of the transfer between basins, the Phosphorus Rule could not be applied to find that St. Cloud's phosphorus discharge "affects" the Vadnais Chain. The MPCA adopted the

ALJ's recommended order on December 19, 2002, and MCEA appealed the decision to the Minnesota Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed in part, reversed in part, and remanded the matter for a contested case hearing. As the ALJ had done before, the Court of Appeals specifically quoted *Miccosukee*, and it specifically affirmed the decision of the ALJ and the MPCA Citizens' Board on the ruling that St. Paul, and not St. Cloud, was the point source legally responsible for any phosphorus in untreated water removed from the Mississippi River by St. Paul and deposited into the Vadnais Chain.

A reversal of the Eleventh Circuit's holding in *Miccosukee* on the point of inter-basin transfers – that is, of the holding that a point source is *not* legally responsible for pollutants contained in water drawn from one basin and then deposited into another, hydrologically distinct basin – would have the practical effect of holding upstream point source dischargers, including most CGMC members and St. Cloud, legally responsible for the effects of their discharges in hydrologically disconnected waters, even where such effects result from the intervening actions of downstream transfers beyond their control.

It would be illogical to interpret the Clean Water Act in this manner, and the federal circuits are consistent in their interpretation of the Act to prevent such a result. The Clean Water Act's forbearance to regulate the allocation of water for public uses through the NPDES regime has nothing to do with the NPDES program's regulation of the pollutants in those waters – the two inquiries are completely separate. Similarly, the Clean Water Act's regulation of pollutants "added" to navigable waters by

point sources does not inquire as to the original sources of those pollutants. Where the pollutants enter the water body only because of the transfer activity, the transferor's responsibility under the Clean Water Act for such action should be triggered. For these reasons, the CGMC and St. Cloud respectfully request leave to file the attached brief *amici curiae*.

Respectfully submitted,

Dated: 11/14/03

DOUGLAS L. SKOR*
Larson King, LLP
2800 Wells Fargo Place
St. Paul, MN 55101
(651) 312-6574

* *Counsel of Record*
Counsel for the Coalition of Greater Minnesota Cities and the City of Saint Cloud, Minnesota

CHRISTOPHER M. HOOD
STEVEN W. NYHUS
Flaherty & Hood, P.A.
444 Cedar Street, Suite 1200
St. Paul, MN 55101-2129
(651) 225-8840

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FACTUAL BACKGROUND

The City of St. Cloud operates a POTW that discharges directly to the Mississippi River. It is undisputed that St. Cloud does not discharge directly to a lake or reservoir. As the operator of a wastewater treatment facility, St. Cloud is required to hold an NPDES permit, which is periodically renewed by MPCA pursuant to MPCA's NPDES delegation. *See* Minn. Stat. § 115.03, subd. 5. The MPCA promulgated the Phosphorus Rule 30 years ago to address the adverse impact of phosphorus in lakes and reservoirs due to excessive algal growth. The Phosphorus Rule provides, in relevant part:

> Where the discharge of effluent is directly to or affects a lake or reservoir, phosphorus removal to one milligram per liter shall be required....

Minn. R. 7050.0211, subp. 1a (2001).

Because St. Cloud does not discharge directly to a lake or reservoir, the 1 mg/L effluent limit found in the Phosphorus Rule can apply to St. Cloud only if its discharge of phosphorus "affects a lake or reservoir." In the time since MPCA adopted the Phosphorus Rule, St. Cloud's NPDES permit has been reissued five times. Before the MCEA challenged the draft permit in 2001, neither MPCA nor any other party had claimed that St. Cloud was subject to the phosphorus effluent limit found in the Phosphorus Rule.

In January 2001, MCEA requested that MPCA hold a contested case hearing regarding the reissuance of St. Cloud's NPDES permit. The issue certified for a contested case was "whether the discharge of phosphorus from the St. Cloud wastewater treatment plant will affect a lake or reservoir." Among other arguments, MCEA contended that the 1 mg/L limit should be applied to St. Cloud because St. Cloud's phosphorus discharge allegedly affects the Vadnais Chain of Lakes. The Vadnais Chain is not connected to the Mississippi River. Water from the Mississippi River reaches the Vadnais Chain only because the City of St. Paul extracts water from the Mississippi River at its Fridley pumping station, treats it, and artificially transfers it into the Vadnais Chain.

St. Cloud moved for summary disposition on September 5, 2002, arguing among other things that MCEA had failed to establish 1) that St. Cloud discharges to the Vadnais Chain of Lakes, and 2) that St. Cloud's discharge has a measurable effect on algal levels on a downstream lake or reservoir. St. Cloud made this argument in reliance on the instant case.[1] With respect to the Vadnais Chain, the ALJ granted summary disposition because St. Cloud does not "discharge" to the Chain. The ALJ decided, as a matter of law, that "when St. Paul intervenes to pump Mississippi

[1] St. Cloud also relied on the cases identified by the Eleventh Circuit in *Miccosukee* in support of its opinion, including *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988), *DuBois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001), discussed *infra*.

River water into the Vadnais Chain of Lakes, St. Paul becomes the discharger of that water and St. Paul is responsible for any pollutants contained in that water." *In the Matter of the Saint Cloud Wastewater Treatment Plant NPDES Permit*, No. 7-2200-14439-2 (Minn. Off. Admin. Hrngs. October 31, 2002). The Minnesota Court of Appeals affirmed on this point in an unpublished opinion.

SUMMARY OF ARGUMENT

The Petitioner in the instant case claims that the Eleventh Circuit decision, and the *Catskill Mountains* and *DuBois* decisions upon which it relies, will have the practical effect of further stressing an already overburdened NPDES program by requiring millions of dams, levees, canals and diversion structures to obtain NPDES permits to avoid Clean Water Act violations, at an enormous cost to taxpayers. Other *amici*[2] similarly argue that a deep divide exists among the federal circuits about the application of the Clean Water Act's NPDES permitting provisions to transfers of untreated water within a water body or between water bodies for such purposes as drinking water, irrigation, or flood control.

Contrary to these assertions, we submit that the "but for" test applied by the Eleventh Circuit in the instant case is consistent with the decisions of other circuits on the matter of intra-basin and inter-basin transfers, holding that Clean Water Act liabilities are triggered by action. We urge this Court to recognize that failing to hold transferors of untreated water between naturally distinct water bodies accountable under the Clean Water Act for the adverse effects associated with the transferred water subjects upstream sources to liability for downstream acts of third

[2] *See* Brief of *Amici Curiae* The City of New York, the Association of Metropolitan Water Agencies, the National Association of Flood and Stormwater Management Agencies, the American Water Works Association, and the Association of Metropolitan Sewerage Agencies in Support of Petitioner (filed September 10, 2003).

parties. This result would occur even where 1) the upstream discharge is already regulated by an NPDES permit and is in full compliance with Clean Water Act requirements, and 2) the transfer between naturally distinct water bodies occurs without any action by, and often without the knowledge of the upstream point source. On this point, the circuits are consistent: the downstream party transferring (*i.e.*, "discharging") the pollutants is responsible for these impacts.

Since the *Gorsuch* decision in 1982, the federal circuit cases addressing transfers of untreated water by point sources have for the most part fallen into two lines: *intra*-basin transfers for which an NPDES permit would not be required (*National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 165 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Company,* 862 F.2d 580, 584 (6th Cir. 1988)), and *inter*-basin transfers for which requiring the transferor to obtain an NPDES permit would be an appropriate application of Clean Water Act authority (*Committee to Save Mokelumne River v. East Bay Municipal Utility District,* 13 F.3d 305 (9th Cir. 1993), *DuBois v. United States Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1996), and *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2nd Cir. 2001)). The guiding principle running through each case is that where the water bodies in question are naturally, hydrologically distinct – that is, water could not move from one body to the other without the intervening action of a point source – the federal circuits have subjected the transferring point sources to NPDES regulation. This triggers an evaluation of the pollutant impacts associated with the point source. Evaluating pollutant impacts does

not affect rights to the water; it merely requires that the incidental adverse impacts associated with the water transfer be addressed.

Using the Clean Water Act's NPDES permitting mechanism to limit the transfer of pollutants contained in untreated water from one water body to another, naturally distinct water body is consistent with the purposes of the Act. The NPDES program's forbearance to regulate transfers of waters for public purposes has nothing to do with its regulation of point sources adding pollutants to navigable waters, regardless of where those pollutants may have originated. Therefore, the Eleventh Circuit's reasoning with regard to inter-basin transfers and use of a "but for" analysis should be affirmed, regardless of how the remainder of the Petitioner's claims are decided.

ARGUMENT

I

Federal Circuit Court Decisions Agree That Intra-Basin Transfers Within The Same Navigable Water, Such As From One Side of A Dam To Another, Do Not Require An NPDES Permit.

Despite claims to the contrary in the instant case, the distinction between intra-basin and inter-basin transfers *is* significant and fundamental to the exercise of NPDES authority, certainly from the standpoint of an upstream point source that operates under an NPDES permit. The long-simmering question of whether the NPDES requirements of the Clean Water Act apply to discharges from dams and similar impoundments came to a head in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Seeking a declaratory judgment against the Environmental Protection Agency (EPA) on the subject, the National Wildlife Federation (NWF) pointed out that when a river is dammed, and water from the reservoir behind the dam is then released back into the river channel, this can induce a number of significant water quality changes, including but not limited to low or high dissolved oxygen, sediment, dissolved substances, and water with temperatures above or below those in the downstream river channel. *Id.* at 161-164.

The D.C. Circuit identified five elements in the

Clean Water Act's definition of "discharge of a pollutant" that must be satisfied in order for a point source to require an NPDES permit: "(1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*." 693 F.2d at 165; *see also* Clean Water Act § 502(12), 33 U.S.C. § 1362(12). The parties stipulated that dams can at times be "point sources" and that both the rivers and the reservoirs behind them could be "navigable waters"; their dispute was over what constitutes "pollutants," and whether passing allegedly pollutant-laden water from one side of a dam to another constitutes an "addition" "from" a point source. *Gorsuch,* 693 F.2d at 165. The D.C. Circuit noted:

> EPA argues, on the other hand, that for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world; dam-caused pollution, on the other hand, merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river).

Id. After consideration of evidence presented by both parties, the D.C. Circuit appropriately deferred to the EPA's definitions of the term "pollutants" and its construction of the term "addition," concluding that the EPA's construction of these terms in the Clean Water Act, as evidenced by the statutory text and the Act's legislative history, was reasonable. *Id.* at 177. This deference was also based on the Clean Water Act's legislative purpose, and the Court's finding that not requiring NPDES permits

for dams does not frustrate the purpose of the Act. *Gorsuch,* 693 F.2d at 179. The D.C. Circuit concluded that

> if dam-induced pollution was truly of major proportions, someone, be it EPA, the National Wildlife Federation, or other environmental groups, would most likely have brought it to Congress' attention, either in 1972 or 1977. And of course, the National Wildlife Federation, if unhappy with our attempt to divine what Congress would have done about dam-caused pollution had it thought about it, is still free to seek a legislative solution. Unless and until Congress addresses the matter, we cannot say that the Act requires EPA to adopt the strictest possible regulatory solution.

Id. at 182.

The Sixth Circuit applied the five-element definition used by the D.C. Circuit in *Gorsuch* and accorded similar deference to the EPA, this time with the guidance of *Chevron*, to the EPA's construction of the term "addition", given that EPA had utilized a reasonable construction of a statute that the EPA is assigned to administer. *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580, 584 (6th Cir. 1988); *see also Chevron, U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). In this context, it was not unreasonable for the EPA to conclude that the withdrawal of water containing live fish from Lake Michigan, and the re-release of water containing living and dead fish back

into Lake Michigan through electric generation turbines, did not constitute an "addition" of pollutants from the outside world. *Consumers Power Co.*, 862 F.2d at 585-6; *accord Gorsuch*, 693 F.2d at 165.

In both *Gorsuch* and *Consumers Power Co.*, the water body in question did not change: one involved the transfer of water from one side of a dam to another, the other involved the cycling of water in and out of the same lake. Contrast these with the situation faced by St. Cloud, where the waters of the Mississippi River and the Vadnais Chain of Lakes would not intermingle under natural conditions, and that of other POTWs whose discharge may be redirected downstream by the actions of third parties.

Petitioners in the instant case assert that their water management equipment, including the S-9 pump at issue, "are merely tools used to move water and determine the quantity of water in different parts of the system. Without the levee system, the managed waters would naturally flow together as a sheet across south Florida." This is likely true; nonetheless, the Eleventh Circuit's reasoning that a point source is the cause-in-fact of the "addition" of pollutants to a naturally distinct water body when it deposits polluted water from another water body remains sound, assuming that these are naturally *distinct* waters.

Numerous point sources discharge process water of varying quality; POTW's frequently discharge wastewater that is cleaner and freer of pollutants than the receiving waters. The Clean Water Act, however, does not distinguish the need to obtain an NPDES permit based upon the quality of the discharge: the "discharge" is defined as "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A)

(emphasis added). For purposes of whether NPDES regulations apply, a point source can keep pollutants out of a discrete navigable water or let them in, regardless of where the pollutants originated. A point source can be, and often is, a gatekeeper. If the principle of holding point sources responsible for the effects of inter-basin transfers is abandoned on the facts of *Miccosukee*, the transfer of polluted water from one basin to another could continue unabated regardless of its detrimental effects, undercutting the purposes of the Act.

II

Federal Circuit Court Decisions Agree That Inter-Basin Transfers Between Naturally Distinct Navigable Waters, Where The Source Water Could Not Enter The Destination Water But For The Activity Of A Point Source, Require An NPDES Permit For The Point Source Conducting The Transfer.

Petitioner asserts that the "but for" test represents a radical departure from the EPA's traditional construction of the term "addition."[3] This is simply untrue. In support of this assertion, Petitioner discusses *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976). While the Fourth Circuit did note that "those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an

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[3] *See* Petition for a Writ of Certiorari, South Florida Water Management District (filed October 21, 2002), at 15.

addition of pollutants by a plant through which they pass," the Fourth Circuit is silent on the issue of whether the "naturally occurring" constituents were being added to another, naturally discrete water to which the pollutants would not otherwise have traveled. *Appalachian Power Co.*, 545 F.2d at 1377. The "cooling ponds and lakes" at issue in *Appalachian Power Co.* appear to be artificially constructed waters created through dams, where water would be drawn from the pond, cycled through condensers, and then returned to the pond for cooling. *Id.* at 1357-8.

Appalachian Power Co. does not change the distinction between passing pollutants *through* connected waters, and depositing waters containing pollutants *into* naturally distinct waters. The first may not be a point source discharge; the second always is. The first line of cases involved transfers within or between naturally connected waters, or *intra*-basin transfers; therefore a "but for" analysis would not apply.

An example of the second line of cases, *inter*-basin transfers, can be found in *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993). In this case, a facility designed to collect, pump and recirculate highly contaminated drainage from an abandoned zinc and copper mine through a series of reservoirs, primarily the Mine Run Dam Reservoir, contained a spillway that allowed occasional overflows of polluted water into the Mokelumne River during heavy rainfalls. *Id.* at 307.

The Ninth Circuit distinguished *Gorsuch* and *Consumers Power Co.* by pointing out that, first, these cases did *not* categorically exempt all dams from the Clean Water Act's point source regulatory authority. *Mokelumne*

River, 13 F.3d at 308. Second, unlike the release of water from one side of a dammed river channel to the other (*Gorsuch*) or the withdrawal from and return of water to the same water body (*Consumers Power Co.*), the District's reservoirs were naturally distinct bodies designed to collect acid mine drainage. *Id.* It was the incidental release of this drainage that introduced pollutants into the Mokelumne River; therefore, this spillage constituted the "addition" of pollutants from the outside world requiring an NPDES permit. *Id.* at 308.

A clearer example, and one that St. Cloud's situation typifies, may be found in *DuBois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). A, a proposed ski facility expansion in New Hampshire would involve drawing water from Loon Pond, the East Branch of the Pemigewassett River and Boyle Brook to make snow. *Id.* at 1296. Used water from all three sources would then be pumped back into Loon Pond. *Id.* The district court had reasoned that since the East Branch and Loon Pond were both "waters of the United States," they were to be treated as a "singular entity" and could not be considered separately. *Id.* Similarly, the U.S. Forest Service argued that because water from Loon Pond flows out through the East Branch, the waters were "naturally connected" waters of like quality; therefore an NPDES permit was not required for the transfer. *Id.* at 1297.

Relying on *Gorsuch*, *Consumers Power Co.* and *Mokelumne River*, the First Circuit rejected both the "singular entity" and "hydrological connectedness" arguments. With regard to the first, the First Circuit pointed out that pollutants from the East Branch would never enter Loon Pond naturally; although connected, they

are separate bodies of water with a single direction of flow. *DuBois*, 102 F.3d at 1297. Considering both to be a "singular entity" would frustrate the purpose of the Clean Water Act. *Id.*

The Forest Service's "hydrological connectedness" argument also failed because the First Circuit found no evidence in the Clean Water Act of a distinction between "unrelated" and "hydrologically connected" waters; the Act simply refers to "any addition of any pollutant to navigable waters from any point source." *Id.* at 1298; *see also* 33 U.S.C. §1362(12)(A). Further – and as the First Circuit notes, "more compellingly" – simply looking at the direction of flow *from* Loon Pond *to* the East Branch logically indicates that pollutants could not get *into* Loon Pond *from* the East Branch unless someone put them there. Again, the First Circuit focused on the nuance that *but for* the activity of the intervening point source – in this case, the ski facility's snowmaking pump – pollutants from the East Branch could not possibly enter Loon Pond; therefore an "addition" of pollutants could not have occurred. 102 F.3d at 1298.

The First Circuit's rejection of the analyses offered by the district court and the U.S. Forest Service is instructive. The fact that the East Branch and Loon Pond *were* connected indicates that the presence or absence of a natural connection between the source and destination waters does not tell the whole story. As discussed in *Gorsuch*, the "discharge of a pollutant" means "(1) a pollutant must be (2) *added* (3) to navigable waters (4) *from* (5) a *point source*." 693 F.2d at 165; *see also* Clean Water Act § 502(12), 33 U.S.C. § 1362(12). *Mokelumne River* established that the point source need not create the

pollutant but only discharge it. *See Mokelumne River*, 13 F.3d at 308.

DuBois confirms this, and adds the dimension that the diversion of flow by a point source, even when the waters are interconnected, can constitute an addition of pollutants from a point source where the pollutants would not have entered the destination water *but for* the action of the point source.

In the decision below, the Eleventh Circuit confirms that the definition of "discharge of a pollutant" can neither be so restrictive as to exclude pollutants not originating from the point source, nor so expansive as to always include dams and other devices that merely pass along water containing pollutants within or between connected waters. *Miccosukee*, 280 F.3d at 1371. A "but for" test strikes this balance, although it should be noted that the St. Cloud example does not even need this deep an analysis. The Mississippi River and the Vadnais Chain of Lakes are not connected in any way except by St. Paul's pumping station; therefore it becomes the easiest case for comparison and the plainest example of the "but for" test at work.

The *amici* brief filed by the City of New York and others heavily criticizes *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001). Since before World War II, the City of New York has diverted water from the Schoharie Reservoir (behind the Schoharie Dam) through the Shandaken Tunnel, into Esopus Creek, which in turn empties into the Ashokan Reservoir, from which the City draws its drinking water supply. *Id.* at 484. Were it not for the Shandaken Tunnel diversion, water from the Schoharie Reservoir

would flow into Schoharie Creek and eventually the Hudson River, and waters from Schoharie Creek and Esopus Creek would never intermingle until they eventually both flowed into the Hudson River. *Catskill Mountains*, 273 F.3d at 484.

The Second Circuit criticized the application of *Chevron*-style deference, such as that given in *Gorsuch* (although *Gorsuch* pre-dated *Chevron*) and *Consumers Power Co.*, to informal EPA policy statements that have not involved formal action, *e.g.*, notice-and-comment rulemaking. 273 F.3d at 491. In interpreting the term "addition," however, the Second Circuit ultimately reached a conclusion perfectly consistent with *Gorsuch*, *Consumers Power Co.* and subsequent decisions:

> The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. Here, water is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sediment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.

Catskill Mountains, 273 F.3d at 492. Citing a consistent decision in *Dague v. City of Burlington*, 935 F.2d 1343 (2nd Cir. 1991), the Second Circuit explicitly rejected, as the First Circuit had in *DuBois*, any implication of a "singular entity" theory that may be drawn from *Gorsuch* and *Consumers Power Co. Catskill Mountains*, 273 F.3d at 491-92. Indeed, a "singular entity" theory would render the word "addition" in the Clean Water Act meaningless because any interconnected waters could be viewed in this manner. *Id.* at 492.

Amici curiae the City of New York and others argue that extending the *Catskill Mountains* "ladle in the soup pot" analogy excludes consideration of waters coming from above or below, e.g., acid rain or tainted groundwater. This contention is addressed in *Northern Plains Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155 (9th Cir. 2003). Fidelity was extracting coal-bed methane, and in this process groundwater containing a number of chemicals was released into the Tongue River. *Id.* at 1157. The parties stipulated that four of the five elements necessary to prove a Clean Water Act violation were satisfied: there was a (1) discharge (3) from a point source (4) to a navigable water (5) without an NPDES permit. *Id.* at 1159-60. The only issue remaining was whether the groundwater, unaltered by Fidelity but nonetheless containing chemicals that degraded the water quality of the Tongue River, constituted a "pollutant." *Id.* The Ninth Circuit answered this question in the affirmative. *Id.* at 1162. It went on to point out that the mere transport of unadulterated water from one body to another can in fact violate the Clean Water Act, as was held in the present case, *Catskill Mountains*, and *DuBois*.

Northern Plains, 325 F.3d at 1163.

It may very well be correct, as the City of New York asserts, that the Eleventh Circuit erred in requiring an NPDES permit for the pumping of water from one side of a levee to another, in Everglades waters that were once a single, continuous sheet. That distinction in the *Catskill* case, however, is inapposite. The Shandaken Tunnel diverts water, and the pollutants in the water, from Schoharie Creek to Esopus Creek. Were it not for this diversion, the two creeks would not have intermingled at any point before reaching their respective confluences with the Hudson River. The same "but for" test applies in *Catskill Mountains, DuBois,* and *Mokelumne River*.

If, therefore, *Miccosukee* were reversed, the reversal should only go to the point that the transfer of water by the S-9 pump was from one side of a levee to another, rather than from one discrete body of water to another. In other words, *Miccosukee* would shift from fitting into the second line of cases (*inter*-basin transfers) to fitting into the first (*intra*-basin transfers). A reversal should not be used as a lever by which to exempt all transfers of untreated water from NPDES regulation, as some *amici* have urged, because some of these transfers can and do result in the "addition" of pollutants by point sources to navigable waters: precisely the type of activity the Clean Water Act is designed to address.

The Eleventh Circuit in the instant case couched the "but for" test in such a way that strikes harmony between intra-basin and inter-basin transfers:

> When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water but for the change in flow caused by the point source, an addition of pollutants from a point source occurs.

Miccosukee, 280 F.3d at 1368-69.

Rather than upending two decades of Clean Water Act law, the application of the "but for" test captures point source discharges to naturally distinct waters, even where the point source is not producing the pollutants in the transferred water, but continues to exclude dams and similar devices that merely shift, hold, or move water among interconnected or indistinct bodies, even where those waters may contain pollutants. The effects of the "but for" test are not nearly so severe as the Petitioners and others claim.

Overturning the "but for" test, on the other hand, could have dramatically adverse effects on existing POTWs that are currently in compliance with Clean Water Act requirements. If a point source transfers untreated water from one distinct basin to another, and the pollutants contained in the untreated water are carried from one distinct water to another, yet the point source performing the transfer is considered not to be "adding" pollutants under the Clean Water Act, then the focus would shift to upstream point sources. This would subject every upstream

point source to a risk of increased liability, despite full compliance with NPDES permits and other Clean Water Act regulations. Upstream POTWs would be forced to adopt expensive mitigating measures to remedy harm caused not by their own actions, but by those of a single downstream point source.

The St. Cloud case provides an instructive example of how the absence of a "but for" test could affect upstream point sources. As discussed earlier, Mississippi River water enters the Vadnais Chain of Lakes only because St. Paul pumps water from the river, treats it and then transfers it to the lakes. It is the actions of the St. Paul facility alone, and not the river's natural flow or the actions of St. Cloud, that allow additional phosphorus loads associated with Mississippi River water to enter the Vadnais Chain of Lakes. As long as the *but for* test holds, it is reasonable to conclude that St. Cloud is not a discharger to the Vadnais Chain within the meaning of Minnesota's Phosphorus Rule. As the ALJ in the St. Cloud case stated, "when Saint Paul intervenes to pump Mississippi River water into the Vadnais Chain of Lakes, Saint Paul becomes the discharger of that water and St. Paul is responsible for any pollutants contained in that water." This follows the logic of *Miccosukee*, *Catskill Mountains,* and *DuBois*, and that logic is well founded.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge the Court to affirm the decision of the Court of Appeals for the Eleventh Circuit, with regard to the issue of

inter-basin transfers. The Court should uphold the proposition that where a point source 1) changes the natural flow of a body of water and causes it to flow into another navigable water into which it would not otherwise have flowed, and 2) the pollutants contained in the transferred water would not have entered the other navigable water *but for* the change in flow, then 3) the transferor of water becomes the cause-in-fact of the discharge of pollutants and an "addition" of pollutants from a point source occurs, requiring the transferor to obtain an NPDES permit.

Respectfully submitted,

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DOUGLAS L. SKOR*
Larson King, LLP
2800 Wells Fargo Place
St. Paul, MN 55101
(651) 312-6574

* *Counsel of Record*
Counsel for the Coalition of Greater Minnesota Cities and the City of Saint Cloud, Minnesota

CHRISTOPHER M. HOOD
STEVEN W. NYHUS
Flaherty & Hood, P.A.
444 Cedar Street, Suite 1200
St. Paul, MN 55101-2129
(651) 225-8840